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Lau Kean Leong v Lits Solutions Sdn Bhd & Ors

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HIGH COURT (PENANG) — ORIGINATING SUMMONS NO PA-24NCVC-193–03 OF 2017
AHMAD SHAHRIR JC
29 AUGUST 2017

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Civil Procedure — Injunction — Application for — Dispute in relation to ownership of mobile application — Petitioner obtained ex parte injunction against respondent — Petitioner applied inter parte for interlocutory injunction against respondents — Whether petitioner had failed to comply with mandatory requirements of O 29 r 1(2A) of the Rules of Court 2012 — Whether there were bona fide serious issues to be tried — Whether balance of convenience tilted in favour of granting injunction — Whether damages adequate remedy

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The petitioner and the third respondent were shareholders and directors of the first respondent. The third and fourth respondents were the shareholders and directors of the second respondent. The dispute in the present case revolved around a mobile application called 'Flexi Parking'. 'Flexi Parking' enabled parking charges to be paid electronically. In the present case, the ownership of the said mobile application was disputed between the parties. The petitioner had earlier obtained an ex parte injunction against the respondents and; order for the appointment of Michael Ong Teik Hoe from Messrs PAN Corporate Services Sdn Bhd as the receiver and manager. In the present case, the petitioner applied for interlocutory injunction ('encl 5') against the respondents. The respondents raised a preliminary issue that the petitioner in seeking for the ex parte order had failed to comply with the mandatory requirements of O 29 r 1(2A) of the Rules of Court 2012 ('the ROC'). The petitioner submitted that the injunction ought to remain as the requirements of whether there were bona fide serious issues to be tried; whether the balance of convenience tilted in favour of granting the injunction; and whether damages was an adequate remedy, were all answered in favour of the petitioner.

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Held, discharging the injunction and dismissing encl 5 with costs of RM10,000:

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(1) Order 29 r 1(2A) of the ROC was only applicable in ex parte applications but not at the inter parte stage of the application. Likewise, the question of non-disclosure of material facts was only a relevant consideration in the award of cost or in determining the culpability of the petitioner on its undertaking in damages (see para 10).

(2) The act of the third respondent in setting up the second respondent to carry out a competing business with the first respondent showed some serious issues to be tried as to whether the third respondent had thereby acted dishonestly and fraudulently as such or even on the basis of a breach of confidentiality insofar as the business activities of the first respondent was concerned. The petitioner had succeeded in establishing serious issues to be ventilated in the trial proper (see paras 34 & 36).

(3) Justice of the case would lie in favour of the petitioner as opposed to that of the third respondent because the third respondent, being in a fiduciary relationship with the first respondent, had a duty to act in the best interest of the company (see para 37).

(4) The need for the third respondent to provide technical support and other related services concerning the 'Flexi Parking' apps to Majlis Perbandaran Sepang was real. If the third respondent was prevented from carrying out this purpose, it would induce a breach of contract against the Majlis Perbandaran Sepang. For this reason, the balance of convenience tilted in favour of the third respondent (see para 38).

(5) Even if at the end of the day the petitioner's claim could be proved, damages would be an adequate remedy. The alleged acts of the third respondent which affected the petitioner and the first respondent were purely commercial in nature. Based on the pleadings and documents exhibited, there was nothing to suggest that the petitioner would suffer any other form of damage other than monetary in nature. The petitioner, by its own pleadings, had clearly showed that damages would be adequate remedy (see paras 40–41).

(6) There was no provision in the Rules of Court 2012 which allowed for an application for the appointment of receivers and managers to be made on an ex parte basis save in exceptional circumstances or extreme urgency. In the present case, the court was not satisfied that the petitioner had shown that his ex parte application for the appointment of Michael Ong Teik Hoe from Messrs PAN Corporate Services Sdn Bhd as receivers and managers for the first respondent was justified in the circumstances without according the third respondent the opportunity to be heard (see paras 45 & 47).

[Bahasa Malaysia summary

Pempetisyen dan responden ketiga adalah pemegang saham dan pengarah responden pertama. Responden ketiga dan keempat adalah pemegang saham dan pengarah responden kedua. Pertikaian dalam kes ini adalah sekitar aplikasi mobil yang dikenali sebagai 'Flexi Parking'. 'Flexi Parking' membolehkan bayaran letak kereta dibuat secara elektronik. Dalam kes ini, milikan aplikasi mobil ini dipertikaikan oleh pihak-pihak. Pempetisyen telah terlebih dahulu memperoleh injunksi ex parte terhadap responden-responden dan; perintah

pelantikan Michael Ong Teok Hoe dari Tetuan PAN Corporate Services Sdn Bhd sebagai penerima dan pengurus. Dalam kes ini, pempetisyen memohon injunksi interlokutori ('lampiran 5') terhadap responden-responden. Responden-responden membangkitkan isu awalan bahawa pempetisyen, dalam memohon perintah ex parte, gagal mematuhi syarat-syarat wajib A 29 k 1(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Pempetisyen menghujahkan bahawa injunksi tersebut wajar kekal kerana syarat-syarat sama ada terdapat isu-isu bona fide untuk dibicarakan; sama ada imbangan kebarangkalian berpihak pada memberi injunksi; dan sama ada ganti rugi yang diberi cukup, kesemuanya dijawab memihak pada pempetisyen.

Diputuskan, membatalkan injunksi dan menolak lampiran 5 dengan kos RM10,000:

(1) Aturan 29 k 1(2A) KKM hanya terpakai pada permohonan-permohonan ex parte tetapi tidak pada peringkat inter parte permohonan. Begitu juga, soalan ketidakdedahan fakta-fakta material hanya pertimbangan relevan dalam pengawardan kos atau memutuskan kebersalahan pempetisyen dalam mengakui ganti rugi (lihat perenggan 10).

(2) Tindakan responden ketiga dalam menubuhkan responden kedua untuk menjalankan perniagaan bersaing sedangkan responden menunjukkan isu-isu serius untuk dibicarakan iaitu sama ada responden ketiga bertindak tidak jujur dan secara penipuan atau atas dasar pelanggaran kerahsiaan setakat mana aktiviti-aktiviti perniagaan responden pertama adalah berkenaan. Pempetisyen berjaya membuktikan isu-isu serius untuk diselesaikan dalam perbicaraan (lihat perenggan 34 & 36).

(3) Keadilan dalam kes ini berpihak pada pempetisyen dan bukan responden ketiga kerana responden ketiga, yang berada dalam hubungan fidusiari dengan responden pertama, mempunyai tanggungjawab bertindak dalam kepentingan syarikat (lihat perenggan 37).

(4) Keperluan responden ketiga menyediakan sokongan teknikal dan lain-lain perkhidmatan berkaitan bagi aplikasi Flexi Parking buat Majlis Perbandaran Sepang adalah benar. Jika responden ketiga dihalang daripada menjalankan tujuan ini, ini akan mendorong kepada pelanggaran kontrak terhadap Majlis Perbandaran Sepang. Bagi alasan ini, imbangan kebarangkalian berpihak pada responden ketiga (lihat perenggan 38).

(5) Jika pun akhirnya tuntutan pempetisyen boleh dibuktikan, ganti rugi adalah remedi yang cukup. Tindakan-tindakan responden ketiga yang didakwa, yang memberi kesan pada pempetisyen dan responden pertama adalah komersial semata-mata. Berdasarkan pliding dan dokumen-dokumen yang dilampirkan, tiada apa-apa yang mencadangkan bahawa pempetisyen akan mengalami apa-apa bentuk

kerugian selain yang bersifat kewangan. Pempetisyen, melalui plidingnya, telah menunjukkan dengan jelas bahawa ganti rugi adalah remedi yang mencukupi (lihat perenggan 40–41).

(6) Tiada apa-apa peruntukan dalam KKM yang membenarkan permohonan pelantikan penerima dan pengurus dibuat secara ex parte kecuali dalam hal-hal luar biasa atau sangat penting. Dalam kes ini, mahkamah tidak berpuas hati bahawa pempetisyen telah menunjukkan bahawa permohonan ex parte bagi pelantikan Michael Ong Teik Hoe dari Tetuan PAN Corporate Services Sdn Bhd sebagai penerima dan pengurus bagi responden pertama adalah wajar berdasarkan hal-hal keadaan tanpa memberi responden ketiga peluang didengar (lihat perenggan 45 & 47).]

Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3964–4031.

Cases referred to

AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd [2014] 3 MLJ 61, FC (refd)

Air Cool Window Tinting Film (M) Sdn Bhd v Lim Chien Wah & Anor [2011] 1 LNS 1549, HC (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241; [1995] 1 CLJ 461, SC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408; [1990] 1 CLJ Rep 30, SC (refd)

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209, SC (refd)

Datuk Amar James Wong Kim Min & Anor v Dato' Sri Peter Tinggom ak Kamarau [2002] MLJU 771; [2003] 6 CLJ 381, HC (refd)

Delimec Hygiene Sdn Bhd v EMIC (M) Sdn Bhd [2001] 5 MLJ 186, HC (refd)

Ho Chee Kheong & Anor v Megaleap Development Sdn Bhd & Ors [2011] 2 CLJ 835, HC (refd)

Hoy Pak Kwai (suing on behalf of himself andfor the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors [2007] 1 MLJ 508, CA (refd)

Hwang Chin Hor & Ors v Song Seng Sdn Bhd & Ors [1990] 2 MLJ 105, HC (refd)

Kawood Sdn Bhd v HSBC Bank Malaysia Berhad & Ors [2001] MLJU 650; [2001] 8 CLJ 363, HC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur

Bhd [2004] 1 MLJ 316; [2004] 1 CLJ 239, CA (refd)
Lee Ah Lin v Lee Choon Ket and others [2009] MLJU 283, HC (refd)
MRK Nayar v Ponnusamy & Ors [1982] 2 MLJ 174; [1982] 1 MLRA 585, FC (refd)
Matang Holdings Bhd & Ors v Dato Lee San Choon & Ors [1985] 2 MLJ 406 (refd)
Mohamed Zainuddin bin Puteh v Yap Chee Seng [1978] 1 MLJ 40; [1976] 1 MLRH 482 (refd)
Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605; [1996] 3 CLJ 483, CA (refd)
Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd [1999] 5 MLJ 509, HC (refd)
Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd [1993] 3 MLJ 64, HC (refd)
Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428, QBD (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
Sundai (M) Sdn Bhd v Masato Saito & Ors [2013] 9 MLJ 729, HC (refd)
Smith (TJ) & Nephew Ltd v 3M United Kingdom plc [1983] RPC 92, CA (refd)
SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd [2008] 4 MLJ 187; [2008] 4 CLJ 20, CA (refd)
Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2004] 6 MLJ 1, HC (refd)
The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469; [2008] 3 CLJ 221, FC (refd)
United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor [2001] 6 MLJ 511; [2001] 6 CLJ 190, HC (refd)
University of Malaya Medical Centre v Choo Chee Kon & Anor [2008] 3 MLJ 278, HC (refd)
Vestime Corp Sdn Bhd v YBLE Resources Sdn Bhd & Ors [2006] 3 MLJ 554; [2006] 2 CLJ 196, HC (refd)
Yeoh Eng Kong v Dato' Nik Ismail b in Nik Yusoff & Ors [2016] MLJU 936; [2016] 1 LNS 1112, HC (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4) [1998] MLJU 60; [1998] 4 CLJ Supp 319, HC (refd)
Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals [2016] 5 MLJ 91; [2016] 7 CLJ 380, CA (refd)

Legislation referred to

Companies Act 2016 ss 213(1), 346
Courts of Judicature Act 1964 s 25(2), Schedule, para 6
Rules of the High Court 1980 O 30 r 1(4)

A Rules of Court 2012 O 29, O 29 r 1(2A), O 30 r 1(1), 1(4)

Mohamed Reza Abdul Rahim (Reza Rahim & Rajivan) for the petitioner.
Niak Hiong Keong (Sivaram Prasad with him) (Christopher & Lee Ong) for the respondents.

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Ahmad Shahrir JC:

INTRODUCTION

C **[1]** This is an application by the petitioner for interlocutory injunction. The petitioner had earlier, on 7 March 2017, obtained an ex parte injunction against the defendants. As a consequence of the inter parte hearing, this court delivered its decision on 22 June 2017 and set out the grounds of decision in brief. The injunction was discharged and the petitioner's application (encl 5) was dismissed with RM10,000 cost. The order for the appointment of Michael D Ong Teik Hoe from Messrs PAN Corporate Services Sdn Bhd as the receiver and manager was set aside. The cost incurred for and during the appointment of Michael Ong Teik Hoe pursuant to item (c) of the ex parte order dated 7 March 2017 are to be paid by the petitioner. Damages are to be assessed by E the registrar.

[2] The petitioner is not satisfied with the decision and appealed to the Court of Appeal. The notice of appeal dated 3 July 2017 was filed on 4 July 2017. This is the full grounds for the decision.

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BRIEF FACTS

[3] The first respondent is a nominal party in the present action. The petitioner and the third respondents are shareholders and directors of the first G respondent. They hold equal shares. The third and fourth respondents are shareholders and directors of the second respondent.

[4] The dispute between the parties revolves around a mobile application called 'Flexi Parking'. It is a smart application for public car parks whereby it H enables parking charges to be paid electronically using prepaid credits provided through the 'Flexi Parking' application instead of manually using the conventional parking coupons. Ownership of the 'Flexi Parking' application is disputed between the parties.

I **[5]** Introduction for use of the 'Flexi Parking' application is made through collaboration with concession holders for public car parks under the respective municipal councils. The 'Flexi Parking' application was first introduced in Alor Setar, Kedah. The concession holder is Kayangan Parking Sdn Bhd. Later the business expands to Sepang, Selangor through collaboration with the

concession holder, Suasa Efektif (M) Sdn Bhd. Later, the first respondent bid for another project in Shah Alam, Selangor through the same entity.

[6] On 7 March 2017, the petitioner obtained an ex parte injunction against the respondents before another quorum. A copy of the ex parte injunction was served on Suasa Efektif (M) Sdn Bhd although the injunction was not directed to it and neither is it a party to the present action. Counsel for the petitioner denies serving it on Suasa Efektif (M) Sdn Bhd and explains during clarification for the inter parte on 5 June 2017 that it may have been done without his knowledge by the petitioner himself. Majlis Perbandaran Sepang later called the third respondent and Suasa Efektif (M) Sdn Bhd for a meeting on 22 March 2017. In that meeting, it was intimated to the third respondent that the use of 'Flexi Parking' will be terminated if the interim injunction is eventually allowed to remain.

CONTENTION OF PARTIES

Preliminary issues

[7] As a matter of preliminary issues and on the basis of *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605; [1996] 3 CLJ 483, *University of Malaya Medical Centre v Choo Chee Kon & Anor* [2008] 3 MLJ 278 and *Datuk Amar James Wong Kim Min & Anor v Dato' Sri Peter Tinggom ak Kamarau* [2002] MLJU 771; [2003] 6 CLJ 381, the respondent challenged the granting of the ex parte injunction on the grounds that the petitioner in seeking for the ex parte order dated 7 March 2017, had failed to comply with the mandatory requirements of O 29 r 1(2A) of the Rules of Court 2012 whereby the petitioner had failed to state in his affidavit in support affirmed on 1 March 2017 (encl 3):

(a) the salient facts giving rise to the application for interim injunction;

(b) the details of any notice of the application given to the respondents or if notice was not given, the reasons for not giving notice;

(c) the answers which may or likely to be given by the respondents against the application; and

(d) any facts which may lead the court not to grant the application on an ex parte basis or at all.

[8] As part of the preliminary issues, the respondents also argues that there has been a non-disclosure of material facts by the petitioner in making the ex parte application and that such non-disclosure alone should be a sufficient ground for this court to refuse the inter parte injunction. According to the

respondents, the petitioner failed to disclose certain material facts, to wit, that: (i) the petitioner was aware that the third respondent had intended to resign from the first respondent as early as 27 November 2016 and the petitioner in fact was not taken by surprise; (ii) the petitioner himself had met with the third respondent in early January 2017 to propose that the business of 'Flexi Parking' application be carried on by the second respondent and a percentage of the collected fees be given to the first respondent; and (iii) that the petitioner had failed to cause the audited financial statements of the first respondent to be filed with the Companies Commission of Malaysia. The respondents rely on the authority of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; [2004] 1 CLJ 239, *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40; [1976] 1 MLRH 482, *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 and *MRK Nayar v Ponnusamy & Ors* [1982] 2 MLJ 174; [1982] 1 MLRA 585.

[9] The petitioner on the other hand argues in a nutshell that O 29 r 1(2A) of the Rules of Court 2012 issues are not the basis for consideration at the inter parte hearing and even if it is, the petitioner had already fully complied with the same.

[10] In this respect, I agree with the contention of the learned counsel for the petitioner that O 29 r 1(2A) of the Rules of Court 2012 is only applicable in ex parte applications but not at the inter parte stage of the application as decided in *Delimec Hygiene Sdn Bhd v EMIC (M) Sdn Bhd* [2001] 5 MLJ 186. Likewise, the question of non-disclosure of material facts is only a relevant consideration in the award of cost or in determining the culpability of the petitioner on its undertaking in damages (see: *Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd* [1993] 3 MLJ 64).

Contention of the petitioner

[11] The petitioner alleges that the 'Flexi Parking' application belongs to the first respondent. The petitioner alleges that without his knowledge or consent, the third respondent had secretly incorporated the second respondent with a name intended to mislead the public that the second respondent is the first respondent because the name of the second respondent mimics the name of the first respondent when abbreviated. The petitioner also alleges that the third respondent made claims from the first respondent for preparatory works in respect of the project in Shah Alam but diverted the transaction and profits for the project in Shah Alam to the second respondent instead.

[12] The petitioner claims:

(a) that the third respondent had wrongfully incorporated and became a director of the second respondent which carries out a business similar to that of the first respondent;

(b) that the third respondent had wrongfully diverted the project in Shah Alam for his own benefit and jeopardised the business interest of the first respondent;

(c) that the third respondent had wrongfully and in breach of trust made claims from the first respondent for preparatory works in respect of the project in Shah Alam but diverted the transaction and profits for the project in Shah Alam to the second respondent;

(d) that the third respondent had wrongfully used information and 'know-how' of the first respondent for his personal gains while causing loss to the first respondent;

(e) that the third respondent had deliberately incorporated the second respondent with a name intended to mislead the public that the second respondent is the first respondent; and

(f) that the fourth respondent acted in cahoots with the third respondent to injure the business of the first respondent:

(i) in allowing the third respondent to become the director for the second respondent to carry out a business similar to that of the first respondent;

(ii) in allowing and collaborating with the third respondent to wrongfully divert the project in Shah Alam to the second respondent for personal gains and injuring the business of the first respondent;

(iii) in wrongfully using the information and 'know-how' of the first respondent for his personal gains; and

(iv) in allowing or carrying on the business with the third respondent under a name intended to mislead the public that the second respondent is the first respondent.

[13] The petitioner further alleges that the third respondent has refused, failed and/or neglected from carrying out his duties as a shareholder and director of the first respondent. The petitioner claims that in view of these events, it is important that an interim injunction be granted to preserve the status quo between the petitioner and the respondents in order to preserve the goodwill of the first respondent and to prevent the second, third and fourth respondents from further wrongfully encroaching into the business of the first respondent.

[14] The petitioner contends that the act of the third respondent in incorporating the second respondent and diverting the business of the first

respondent to the second respondent amounts to a breach of the third respondent's fiduciary duties as a shareholder and director of the first respondent and that such acts are oppressive against the first respondent and the petitioner. The petitioner relies on ss 213(1) and 346 of the Companies Act 2016 and cited the case of *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73 for the legal proposition that directors owe a fiduciary duty towards his company. The petitioner also relies on the case of *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469; [2008] 3 CLJ 221 to support his contention that a fiduciary such as the third respondent in the present case must act in good faith, must not make a profit out of his trust, must not place himself in a position where his duty and his interest may conflict and that he must not act for his own benefit or that of a third person without the informed consent of his principal, the first respondent.

[15] It is the petitioner's case that the injunction ought to remain as the requirements of: (i) whether there are bona fide serious issues to be tried; (ii) whether the balance of convenience tilts in favour of granting the injunction; and (iii) whether damages is an adequate remedy as enunciated in the case of *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293, are all answered in favour of the petitioner.

[16] In respect of bona fide serious issues to be tried, the petitioner argues firstly, the fact that the third respondent had acted to the detriment of the first respondent when he incorporated the second respondent and divert the business of the first respondent to the second respondent is a bona fide serious to be tried. In support of his contention, the petitioner cited the cases of *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91; [2016] 7 CLJ 380, *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209, *Air Cool Window Tinting Fim (M) Sdn Bhd v Lim Chien Wah & Anor* [2011] 1 LNS 1549, *Sundai (M) Sdn Bhd v Masato Saito & Ors* [2013] 9 MLJ 729 and *Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd* [1999] 5 MLJ 509. Secondly, the third respondent is guilty of breach of trust when he made a claim from the first respondent for the sum of RM6,664.52 purportedly in his capacity as a director of the first respondent but directed the Majlis Bandaraya Shah Alam project to the second respondent to the detriment of the first respondent. The petitioner relies on the case of *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4)* [1998] MLJU 60; [1998] 4 CLJ Supp 319 for the proposition that the unlawful utilisation of funds by a director for personal gains are blatant acts of breach of trust and that a generally director in a fiduciary relationship is not allowed to enter into engagements which give rise to a conflict of interest.

Thirdly, the act of the third respondent incorporating the second respondent which bears a semblance in name with the first respondent is intended to pass off the second respondent as the first respondent. Fourthly, the third respondent alleges that he is the owner of the patent and/or trademark of 'Flexi Parking' but the petitioner had demonstrated in his affidavit in reply affirmed on 12 April 2017 that the third respondent's application was deemed refused by MyIPO. Fifthly, the second respondent was not incorporated with the knowledge of the petitioner as alleged by the third respondent and that there was no resolutions passed or produced to show the same.

[17] The petitioner maintains that balance of convenience lies in granting the injunction sought and argues that the termination by the municipal council of the use of the 'Flexi Parking' application will only take the third respondent out of the equation but the 'Flexi Parking' application would still be able to run. The petitioner also argues that damages would not be an adequate remedy as the matter involves the goodwill and business reputation of the first respondent and that it is important that the status quo be maintained pending the disposal of the suit proper to safeguard the interest of the petitioner and the first respondent.

Contention of the respondents

[18] The respondents contend that the 'Flexi Parking' application was the brainchild of the third respondent. The development of the 'Flexi Parking' application started with the attempted use of the short messaging system ('SMS') technology in managing public car parks. The third respondent tried to source the use of SMS technology from a third party provider but it was too expensive. Later, this had led the third respondent to jointly develop the 'Flexi Parking' application together with his software engineers, Jack Lee and Danny Ng.

[19] According to the third respondent, he had instructed a patent agent to prepare the necessary application for patent in respect of 'Flexi Parking'. In that application, the third respondent was named as the sole applicant and inventor of the 'Flexi Parking' application for patent. The third respondent had also sent an application under his own name for the registration of trademark for the 'Flexi Parking'.

[20] The third respondent had met the petitioner with a view to collaborate in pursuing the 'Flexi Parking' application as a business concern. An arrangement was made whereby the third respondent is tasked with the responsibility to manage technical matters and the petitioner is responsible for marketing and finance. For the purposes of the business venture, the first respondent was incorporated. The third respondent and the petitioner each

A holds 50% shares in the first respondent. Jack Lee and Danny Ng were employed to work for the first respondent.

[21] The third respondent alleges that the plan did not work out well. At the material time, the third respondent had to use his own funds to develop the B 'Flexi Parking' application although this was supposed to be financed by investments to be generated by the petitioner. It is the third respondent's contention that at all material times the development of the 'Flexi Parking' application was completed by the third respondent together with the assistance of his engineers using his own funds exclusively. The third respondent alleges C that without his knowledge, the petitioner had used all information relating to the 'Flexi Parking' application, which the third respondent had earlier sent to the petitioner, for the purposes of a project presentation with Majlis Bandaraya Alor Setar. Later, the first respondent was appointed by Kayangan Parking Sdn Bhd to carry out works to develop and run the 'Flexi Parking' application for D car parks at Alor Setar.

[22] The third respondent alleges that the petitioner had failed in his responsibilities towards the business. The third respondent and the workers E employed by the first respondent did not receive their respective pay for about eight months after the first respondent was incorporated. The third respondent had resorted to sourcing his own funding to develop the 'Flexi Parking' application because the petitioner had failed to secure sufficient financial backing. Eventually, the software engineers left the employment of the first F respondent. The marketing aspect was also not attended to by the petitioner resulting in the third respondent having to start his own marketing in the electronic media through the 'facebook' application. The third respondent later sent out proposals to a number of municipal councils and allow them free trials of the 'Flexi Parking' application and generate some income through G advertisements. The third respondent was then introduced to Suasa Efektif (M) Sdn Bhd, one of the concession holders for public car parks in Selangor.

[23] The third respondent had initially wanted to incorporate a company with the name 'Green Innoys Sdn Bhd' but that name was not available. This H has led to the third respondent incorporating the first respondent which resembles the initials of his own name.

[24] In relation to the sum of RM6,664.52 the third respondent claims from the first respondent, the third respondent maintains that that money are for I expenses for the months of August to November 2016 which the third respondent only claimed in December 2016 due to the first respondent not having sufficient funds in its coffers. The third respondent later decided not to continue with the business arrangement with the petitioner and the first respondent due to the petitioner not living up to his part of the bargain.

[25] Due to some issues relating to inability of the first respondent to continue with its business dealing because of outstanding tax returns and non-filing of accounts and financial statements, the third respondent proceeded to incorporate the second respondent with the knowledge of the petitioner in order to pursue the business in respect of the 'Flexi Parking' application. The third respondent had also applied for and was approved the registration with the Ministry of Finance to enable and facilitate direct business dealings to be made with the respective municipal councils.

[26] On 16 December 2016, the third respondent together with Majlis Perbandaran Sepang and Suasa Efektif (M) Sdn Bhd applied for a new registration of patent for the 'Flexi Parking' application. The second respondent was later appointed by Suasa Efektif (M) Sdn Bhd to provide the 'Flexi Parking' application services within Majlis Perbandaran Sepang and Majlis Bandaraya Shah Alam. On 6 February 2017, the third respondent submitted his application to MyIPO to register his trademark for the 'Flexi Parking' application and tendered his resignation from the first respondent.

[27] The respondents also rely on the case of *American Cyanamid Co v Ethicon Ltd* and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* and contends that the petitioner had failed to satisfy the requirements for the grant of the interlocutory injunction. The respondents also argue that the appointment of a receiver and manager in the manner applied for by the petitioner is clearly not an application which can be said to reside within the ambit of O 29 of the Rules of Court 2012. The respondents rely on the case of *Hoy Pak Kwai (suing on behalf of himself andfor the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508 for the proposition that the petitioner's application must be confined to within the ambit of the provisions upon which his application is based and that since the relief for the appointment of a receiver and manager is sought by the petitioner in this application, it must necessarily fail.

[28] The respondents further argue that balance of convenience lie in favour of not granting the injunction because damages is an adequate remedy for the petitioner based on the fact that the petitioner in his prayers had prayed for: (i) RM1m exemplary damages; and (ii) RM500,000 general damages. This, according to the respondents is clearly evidence that the petitioner's claim is readily quantifiable and may be adequately compensated with damages. The respondents rely on the authority of *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2014] 3 MLJ 61 and *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187; [2008] 4 CLJ 20. The respondents further refer to *Smith (TJ) & Nephew Ltd v 3M United Kingdom plc* [1983] RPC 92 and argues that the petitioner should not be entitled to the injunction because as late as January 2017, the petitioner willingly agree that

the second respondent enters into contracts with the municipal councils in return of a percentage of collected fees for the first respondent. This fact is evidence of the fact that the petitioner was willing to waive his complaint in return for the payment of collected fees. The respondent seals his argument by contending that the petitioner had not come to court with clean hands for his failure to disclose material facts. The respondents cited the case of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1.

ANALYSIS AND FINDINGS

[29] At the outset, it is important to note that the petitioner, vide the ex parte order dated 7 March 2017, had also obtained an order for the appointment of receivers and managers to be the joint signatories together with the petitioner for all cheques and financial transactions involving the account of the first respondent maintained at CIMB Bank Bhd. I shall deal with the ex parte appointment of receivers and managers at a later part of this judgment.

[30] In considering an application for interlocutory injunction, this court must satisfy itself of the primary serious question to be tried test as decided by the then Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; [1995] 1 CLJ 461 (SC) whereby His Lordship Hj Mohd Jemuri Serjan CJ (Borneo) (as His Lordship then was) said at p 266 (MLJ); p 484 (CLJ):

> In view of the welter of authorities especially those quoted above it is beyond comprehension why the learned Judge did not consider as a matter of *principle and priority* the question whether there was in this case a serious issue to be tried but leapfrogged to consider the question of adequacy of damages and balance of convenience instead. (Emphasis added.)

And further at p 266 (MLJ); p 484 (CLJ):

> At an interlocutory proceeding for an injunction the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties but the court must be satisfied that there is a serious issue to be tried. The court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case. This is settled law now hallowed by the famous words of Lord Diplock in the *American Cyanamid*'s case:
>
> > ... It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.

[31] In the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 206–207; [1995] 1 CLJ 293 at pp 305–306 (CA) His Lordship Gopal Sri Ram JCA (as His Lordship then was) has laid down the

law in these clear terms:

To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

first, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is the end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as (to) damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

thirdly, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* (1984) AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Serious issues to be tried

[32] The petitioner alleges that the third respondent had acted oppressively and breached his fiduciary duties as directors of the first respondent when he incorporated the second respondent which share the same abbreviation as that of the first respondent, with the intention to cause confusion in the minds of the public, to the detriment of the petitioner's shareholding in the first respondent and divert business arising out of the 'Flexi Parking' apps from the first respondent to the second respondent. The petitioner also alleges that the third respondent has made fraudulent claims from the first respondent for work allegedly done for the first respondent but directed the business concerned to the second respondent. It was also argued that the third respondent had used the first respondent's 'know-how' with regard to the 'Flexi Parking' apps for the third respondent's personal gains. As far as the fourth respondent is concerned, the petitioner alleges that the fourth respondent had collaborated with the third respondents on all scores.

[33] The third respondent argues that the 'Flexi Parking' apps was developed by him together with Danny Ng and Jack Lee and that the third respondent went through great difficulties in trying to make the 'Flexi Parking' apps a successful business for the first respondent. It is the third respondent's case that as part of the business arrangement, the petitioner's role is in relation to finance and marketing of the 'Flexi Parking' apps while the third respondent would concentrate of the development of the 'Flexi Parking' apps. However, the financial backing and marketing efforts from the petitioner was not forthcoming resulting in the third respondent having to incorporate the second respondent. The third respondent then on his own secured a venture with Majlis Perbandaran Sepang under the guise of the second respondent to market the 'Flexi Parking' apps and went on to make applications to register its patent of the 'Flexi Parking' apps together with Majlis Perbandaran Sepang. Subsequently, the second respondent managed to be appointed by Majlis Bandaraya Shah Alam to provide services related to the 'Flexi Parking' applications.

[34] Upon evaluation of the pleadings without going to its merits, it would appear that there are serious issues to be tried as to whether the third respondent had in fact used any knowledge gained during his tenure as a director in the first respondent to advance his own business interests. A director owes a fiduciary duty to act in the best interest of the company and should not allow his own personal interest to surpass that onerous duty. The act of the third respondent in setting up the second respondent to carry out a competing business with the first respondent begs some serious issues to be tried as to whether the third respondent had thereby acted dishonestly and fraudulently as such or even on the basis of a breach of confidentiality insofar as the business

activities of the first respondent is concerned. Be that as it may, I do not find the contention that the sum of RM6,664.52 taken by the third respondent from the first respondent coffers to allegedly further the business interest of the second respondent constitute a serious issue to be tried as it is clear from the third respondent's affidavit that this sum was in fact approved by the petitioner himself and was for claims arising before the second respondent was incorporated.

[35] To my mind, the issue of whether the 'Flexi Parking' apps in fact belongs to the third respondent but was put in the equation for the business purposes of the first respondent or whether the first respondent actually co-owns the 'Flexi Parking' apps together with the third respondent, are not clear at this stage due to the absence of a definitive patent registration. I am of the view that that issue can only be satisfactorily determined by viva voce evidence and not at this stage of the proceedings.

[36] On these basis, I find that the petitioner has succeeded in establishing serious issues to be tried to be ventilated in the trial proper.

Justice of the case

[37] On the same breadth, I am of the view that justice of the case would lie in favour of the petitioner as opposed to that of the third respondent because the third respondent, being in a fiduciary relationship with the first respondent, had a duty to act in the best interest of the company.

Balance of convenience

[38] In respect of the balance of convenience to preserve the status quo, the third respondent in its affidavit states that a copy of the ex parte injunction was served on Majlis Perbandaran Sepang although the injunction was not directed to it. This has resulted in a meeting being called up by Majlis Perbandaran Sepang and termination of use of the 'Flexi Parking' apps became imminent. In the circumstances, I am of the view that the need for the third respondent to provide technical support and other related services concerning the 'Flexi Parking' apps to Majlis Perbandaran Sepang is real. If the third respondent is prevented from carrying out this purpose, it would induce a breach of contract against the Majlis Perbandaran Sepang. For this reasons, I find that the balance of convenience tilts in favour of the third respondent.

Whether damages an adequate remedy

[39] The question of whether damages would be an adequate remedy is a question of facts which must be considered if it is established that there are

serious issues to be tried. In the case of *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408; [1990] 1 CLJ Rep 30 (SC), the then Supreme Court held that if damages is a sufficient remedy, the court should not proceed to grant the injunction. At p 32 of the case, the then Supreme Court observed that:

> ... the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the Court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly Co v Cross* (1886) 31 Ch D 354 at p 369:
>
> > The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.

[40] Is damages an adequate remedy in the present case? The petitioner's case centres on the alleged breach of fiduciary duties by the third respondent as a director of the first respondent arising out of the incorporation of the second respondent which carries on a business similar to the first respondent. After evaluating the petitioner's case, I find that even if at the end of the day the petitioner's claim can be proved, damages would be an adequate remedy. The alleged acts of the third respondent which affects the petitioner and the first respondent are purely commercial in nature. Based on the pleadings and documents exhibited, there is nothing to suggest that the petitioner would suffer any other form of damage other than monetary in nature. Even without going into the merits of the issue of ownership of the 'Flexi Parking' apps, I am of the view that there is equally no convincing evidence at this stage to show that the petitioner or the first respondent in fact had any proprietary as distinguished from pecuniary interest in the 'Flexi Parking' apps.

[41] I further find that the petitioner, by its own pleadings, had clearly showed that damages would be an adequate remedy. In *Kawood Sdn Bhd v HSBC Bank Malaysia Berhad & Ors* [2001] MLJU 650; [2001] 8 CLJ 363, His Lordship Zakaria Sam J (now JCA) observed at p 12 (MLJ); p 371 (CLJ) as follows:

> The plaintiff has not shown that if the injunction is refused damages would not be an adequate remedy. In fact, in the statement of claim the plaintiff's claiming for damages to be assessed together with interest. By its own admission, the plaintiff acknowledged that damages is an adequate remedy and can be assessed and quantifies. As such, there is no basis for this court to grant the injunction as sought by the plaintiff (see: *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 1590).

[42] In his prayer, the petitioner claims, amongst others, exemplary damages for the sum of RM1m or for an amount to be assessed by this court with

interest at the rate of 4% from the date of judgment until the date of full realisation and general damages in the sum of RM500,000 with the same interest. Interestingly, the petitioner in his written submissions dated 21 April 2017, had omitted these two prayers for damages without any caveat as to why it was not disclosed as such since the issue of whether damages would be an adequate remedy is a relevant consideration. I am thus of the view that damages is an adequate remedy.

Ex parte appointment of receivers and managers

[43] I shall now deal with the appointment of receivers and managers which was prayed for incidental to the prayer for the injunction and obtained by the petitioner vide the order dated 7 March 2017 on an ex parte basis.

[44] The High Court is empowered to make an order for the appointment of a receiver under s 25(2) of the Courts of Judicature Act 1964 read together with para 6 of the Schedule. The question is, can an order for the appointment of a receiver be made in an application for injunctive reliefs? The petitioner's application dated 7 March 2017 is clearly an application under O 29 of the Rules of Court 2012 for an injunction. The learned counsel for the petitioner submits that he is entitled to make the application and this court is empowered, in that application, to make an order for the appointment of a receiver and manager pending the disposal of the main suit. The following cases were cited in support of that contention. *Lee Ah Lin v Lee Choon Ket and others* [2009] MLJU 283, *Vestime Corp Sdn Bhd v YBLE Resources Sdn Bhd & Ors* [2006] 3 MLJ 554; [2006] 2 CLJ 196, *Yeoh Eng Kong v Dato' Nik Ismail b in Nik Yusoff & Ors* [2016] MLJU 936; [2016] 1 LNS 1112, *Hwang Chin Hor & Ors v Song Seng Sdn Bhd & Ors* [1990] 2 MLJ 105 and *Matang Holdings Bhd & Ors v Dato Lee San Choon & Ors* [1985] 2 MLJ 406.

[45] O 30 r 1(1) of the Rules of Court 2012 provides that an application for an injunction *ancillary or incidental* (emphasis added) to an order appointing a receiver may be joined with the application for such order. In other words, in an application for the appointment of a receiver under O 30 r 1(1) of the Rules of Court 2012, an ancillary or incidental application for an injunction may be made. However, I do not find any provision in the Rules of Court 2012 which allows for an application for the appointment of receivers and managers to be made on an ex parte basis save in exceptional circumstances or extreme urgency. Her Ladyship Zaleha Yusof JC (now JCA) in the case of *Ho Chee Kheong & Anor v Megaleap Development Sdn Bhd & Ors* [2011] 2 CLJ 835 (HC) held, inter alia, that:

> The court jurisdiction to grant the ex parte order must be exercised very sparingly with great caution, circumspection and in the case of extreme urgency.

[46] In the case of *United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor* [2001] 6 CLJ 190; [2001] 6 MLJ 511 (HC), His Lordship Mohd Ghazali J (as His Lordship then was) held that an application for the appointment of a receiver must be made inter parte and not ex parte because the words '... until after the hearing of a summons for the appointment of receiver' found in O 30 r 1(4) of the then Rules of the High Court 1980, which is substantially the same as the present O 30 r 1(4) of the Rules of Court 2012, denotes the position that the application for appointment of receivers and managers has to be made inter parte.

[47] In the present case, I am not satisfied that the petitioner has shown that his ex parte application for the appointment of Michael Ong Teik Hoe from Messrs PAN Corporate Services Sdn Bhd as receivers and managers for the first respondent is justified in the circumstances without according the third respondent the opportunity to be heard. To this extent, the order for the appointment of the receiver and manager is set aside.

CONCLUSION

[48] In the circumstances and based on the facts of the present case, I am of the considered view that there is no justification for the injunction to remain. The injunction is hereby discharged and the petitioner's application (encl 5) is dismissed with RM10,000 cost. The order for the appointment of Michael Ong Teik Hoe from Messrs PAN Corporate Services Sdn Bhd as the receiver and manager is set aside. The costs incurred for and during the appointment of Michael Ong Teik Hoe pursuant to item (c) of the order (ex parte) dated 7 March 2017 to be paid by the petitioner. Damages to be assessed by the registrar.

Injunction discharged; encl 5 dismissed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar